



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

JUN 27 2007

Mr. John G. Treitz, Esq.
Mr. J. Wade Hendricks, Esq.
Stoll, Keenon, and Ogden, PLLC
2000 PNC Plaza, 500 West Jefferson Street
Louisville, KY 40202

RE: MUR 5845
Friends of Mike Sodrel and Patrick Byrne,
in his official capacity as Treasurer

Dear Messrs. Treitz and Hendricks:

On October 31, 2006, the Federal Election Commission notified your clients, Friends of Mike Sodrel, and Patrick Byrne, as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 2, 2007, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Friends of Mike Sodrel and Patrick Byrne, in his official capacity as Treasurer, violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact April Sands, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomaseña P. Duncan
General Counsel

A handwritten signature in black ink, appearing to be "Thomaseña P. Duncan", written over a horizontal line.

BY: Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

27044173399

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 5845

RESPONDENTS:

**Friends of Mike Sodrel and Patrick Byrne,
in his official capacity as Treasurer**

I. INTRODUCTION

The complaint alleges that Citizens for Truth, a so-called Section 527 organization,¹ coordinated with the campaign of U.S. Rep. Mike Sodrel in his failed attempt to recapture the House seat representing Indiana's Ninth District. In support of his allegation, the complainant notes that Citizens for Truth ("CFT") was responsible for purchasing billboards and other paid media in the Ninth District opposing Rep. Sodrel's 2004 opponent, former U.S. Rep. Baron Hill, and that CFT removed information from its website regarding these media buys once the Indiana Democratic Party ("IDP") issued a press release on this issue. In addition, the complaint notes that over half of CFT's donors are also contributors to Sodrel's authorized committee, Friends of Mike Sodrel ("FMS"). Finally, the complainant states it has "reason to believe that if you were to request e-mail and cell and home phone records from the founder of 'Citizens for Truth' or any of the group's volunteers, you will find evidence of coordination with members of the Sodrel campaign."

II. FACTUAL SUMMARY AND LEGAL ANALYSIS

The Federal Election Campaign Act of 1971, as amended ("the Act"), defines in-kind contributions as expenditures by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents."

2 U.S.C. § 441a(a)(7)(B)(i). A payment for a coordinated communication is an in-kind

¹ Section 527 organizations refer to organizations that file with the Internal Revenue Service under Section 527 of the Internal Revenue Code.

27044173400

contribution to the candidate's authorized committee with which it is coordinated and must be reported as an expenditure made by that candidate's authorized committee. 11 C.F.R.

§ 109.21(b)(1). In addition, as an in-kind contribution, the costs of a coordinated communication must not exceed a political committee's applicable contribution limits. *See* 2 U.S.C. § 441a.

To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets forth a three-pronged test: (1) the communication must be paid for by a person other than a Federal candidate, a candidate's authorized committee, or political party committee, or any agent of any of the foregoing; (2) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied. *See* 11 C.F.R. § 109.21(a).

A. Payment Prong

The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied. In its Response, CFT admits to making the "billboard buy" in 2004² to which the complainant apparently refers.³

B. Content Prong

At all times relevant to this matter, the content prong was satisfied if the communications at issue met at least one of four content standards: (1) a communication that was an electioneering communication as defined in 11 C.F.R. § 100.29; (2) a public communication that

² This appears to be a 2004 election cycle complaint filed in the midst of the 2006 election cycle. There do not appear to be any allegations with respect to activity that occurred during the 2006 election cycle, except for the removal of information from the CFT website regarding 2004 media buys once the IDP issued a press release on this issue, which is a factual assertion and not a violation in and of itself.

³ While the complaint mentions "other paid media" in addition to this billboard buy, it provides no additional information, nor are other media mentioned in the Responses. However, the billboard buy admitted to by CFT is sufficient to satisfy the payment prong.

republished, disseminated, or distributed candidate campaign materials; (3) a public communication containing express advocacy; or (4) a public communication, in relevant part, that referred to a clearly identified Federal candidate, publicly distributed or disseminated 120 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate. *See* 11 C.F.R. § 109.21(c).⁴

The complaint provides no information indicating whether the content prong may be satisfied. The complaint alleges that the “billboards and other paid media” purchased by CFT were “anti-Hill.” However, it does not provide any information regarding the message or text of the billboard, nor does it provide any information about the “other paid media” alleged to have been coordinated by CFT and the Sodrel campaign. In its Response, CFT denies the claims in the complaint. CFT acknowledges that “one of its primary endeavors has been to shine light on the record of Congressman Baron Hill,” but it also provides no specific information about its billboard buy. Further, the complainant does not provide a timeframe to determine whether the billboard contained its allegedly “anti-Hill” message within 120 days or fewer before a primary or general election. Nevertheless, even assuming that the public communication standard of the content prong is met, the complainant provides no facts on which to base an investigation into whether the conduct prong may be satisfied.

⁴ In *Shays v. FEC*, No. 04-5352 (D.C. Cir. July 15, 2005), the Appellate Court affirmed the District Court’s invalidation of the fourth, or “public communication,” content standard of the coordinated communications regulation. The District Court had remanded the matter back to the Commission, but in a ruling subsequent to the remand, the District Court explained that the “deficient rules technically remain ‘on the books,’” pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004). In response to the *Shays* litigation, new regulations were promulgated by the Commission that became effective June 8, 2006. However, because the activity that is the subject of the complaint took place in 2004, the prior regulation governs this matter.

27044173402

C. Conduct Prong

27044173403

The Commission's regulations set forth five types of conduct between the payor and the committee, whether or not there is agreement or formal collaboration, that can satisfy the conduct prong. *See* 11 C.F.R. § 109.21(d). To meet the conduct prong of the coordination communication test, the communication must have been made at the request or suggestion of the Federal candidate, with some material involvement by the Federal candidate, as a result of substantial discussions with the Federal candidate, or through the use of a common vendor,⁵ employee or independent contractor⁶ that the Federal candidate also used. 11 C.F.R. § 109.21(d).

To support its allegation of coordination between CFT and FMS, the complaint relies upon an overlap of donors, anonymous sources who allege coordination, and suggests that if the Commission requested e-mail and phone records of CFT volunteers or employees, we would find

⁵ The common vendor conduct standard requires that (1) the person paying for the communication contracts with or employs a commercial vendor to create, produce or distribute the communication; (2) that commercial vendor provided certain enumerated services, including media content development, polling, media production, and political or media consulting, to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and (3) that commercial vendor uses or conveys material information to the person paying for the communication about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee or material information used previously by the vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. *See* 11 C.F.R. § 109.21(d)(4); *see also* Coordinated Communications, 71 Fed. Reg. at 33,209-210. The 120-day period for determining whether an individual or entity qualifies as a common vendor became effective on July 10, 2006. *See* Coordinated Communications, 71 Fed. Reg. at 33,204. Prior to this date, individuals or entities qualified as common vendors if they provided the specified services within the same election cycle. *See* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

⁶ A communication meets the former employee standard if, *inter alia*, it is paid for by the employer of a person who was an employee or independent contractor of the candidate's committee during the previous 120 days; and the former employee or independent contractor uses or conveys to the person paying for the communication: (1) information about the candidate's plans, projects, activities, or needs, and that information is material to the creation, production, or distribution of the communication; or (2) information used by the former employee or general contractor in providing services to the candidate is material to the creation, production, or distribution of the communication. 11 C.F.R. § 109.21(d)(5).

evidence of coordination. This information does not give rise to an inference of coordination and is inadequate to support a finding of reason to believe. For example, the complainant notes that over half of CFT's donors are also contributors to Sodrel's authorized committee, FMS. The fact that there is an overlap of donors between CFT and FMS does not give rise to an inference of coordination, as elucidated by the Response from FMS:

"Some commonality of donors should not be surprising. If 'Citizens for Truth' opposes Mr. Hill, the possibility that an individual may donate to both groups, would simply be a reflection of support for Congressman Sodrel, opposition of Mr. Hill, or both. As such, donating to both groups would not be an indication of either collaboration or coordination of efforts, merely a reflection of that support or opposition."

Further, purported information from "several anonymous sources on the campaign trail" regarding allegations of coordination can and should be afforded no weight as no details are provided and there is no way to verify the information. *See* Statement of Reasons in MUR 4960 ("complaints not based upon personal knowledge should identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented."); *see also* 11 C.F.R. §§ 111.4(d)(2) and (3). Finally, the complainant states he has "reason to believe that if you were to request e-mail and cell and home phone records from the founder of 'Citizens for Truth' or any of the group's volunteers, you will find evidence of coordination with members of the Sodrel campaign." Assuming that reviewing e-mail and phone records from the founder of CFT or any of its volunteers would provide evidence of coordination with the Sodrel campaign, without more, is pure speculation. There are also no allegations of the use of a common vendor, former employee or independent contractor by both CFT and FMS. In essence, the complaint amounts

27044173404

to speculation surrounding the 2004 billboard buy admitted to by CFT, which does not, without more, support any inference of coordination between FMS and CFT.⁷

D. Conclusion

On balance, while the Responses do not delve into great detail to support their denials of coordination, the allegations in the complaint lack sufficient facts to warrant an investigation. The complaint does not provide enough facts or well-grounded assertions that, if true, would provide a basis upon which to conclude there is reason to believe a violation of the Act has occurred.⁸ Therefore, the Commission finds no reason to believe that Friends of Mike Sodrel, and Patrick Byrne, in his official capacity as Treasurer, violated the Act.

⁷ The complaint also infers wrongdoing by the fact that CFT removed from its website the following on its "About Us" page: "CFT ran radio advertisements, erected billboards, and posted www.WhereIsBaron.com during the 2004 election cycle to educate people about Baron Hill's positions on key issues of concern to Hoosiers. And, we are back to do it again!" Removal of the information on the CFT website regarding Barron Hill after the IDP issued its press release about the complaint, even if true, is not incriminating. In addition, CFT disputes the timing of the removal of this information, indicating in its Response that the website "was changed BEFORE the IDP issued its press release" about the complaint (emphasis in original).

⁸ The Commission may find reason to believe if a complaint sets forth sufficient specific facts which, if proven true, would constitute a violation of the Act. Unwarranted legal conclusions from asserted facts or mere speculation, however, will not be accepted as true. Statement of Reasons, MUR 4960 (Hillary Rodham Clinton for Senate Exploratory Committee, issued December 21, 2000) (citing Statements of Reasons in MUR 4869 (American Postal Workers Union) and MUR 4850 (Fossella)). Here, the complainant sets forth no facts and offers no specific information that would support his allegations, instead relying on "anonymous sources" and bald assertions. Alleging that a search of the telephonic and electronic records of CFT members would uncover evidence of coordination, without more, does not rise to evidence of a violation. "Such purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred." Statement of Reasons, MUR 4960 citing MUR 4850.

27044173405